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No. 83-1176

In the Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN H. DEMAREST, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the $10 limit in 38 U.S.C. 3404(c) on fees for representatives of veterans seeking disability benefits, which was enacted to protect the benefits from depletion, violates the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 718 F.2d 964. The order of the district court (Pet. App. B1-B2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1983. The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following his honorable discharge from the United States Air Force in 1980, petitioner filed two claims for disability benefits with the Veterans' Administration (Pet. App. A1, C2). He was represented by the American Red Cross before the Board of Veterans Appeals (*id.* at C1).

After consideration of his application and a physical examination, the VA determined that petitioner's injuries, although service-connected, were not disabling to a compensable degree, and therefore it denied his claims (*id.* at A1, C1-C8).

2. Petitioner brought this action in the United States District Court for the Western District of Washington. He challenged the VA's handling of his claims for benefits and sought damages under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.* He also argued that his right to procedural due process was violated by 38 U.S.C. 3404(c), which limits to $10 per claim the amount of fees payable by a veteran to an attorney or agent for representation in seeking benefits before the VA.[2] The court granted summary judgment for the respondents. Relying on this Court's summary affirmance upholding the constitutionality of 38 U.S.C. 3404(c), see *Gendron* v. *Levi*, 423 U.S. 802, aff'g *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975) (three-judge court), the district court held that petitioner's constitutional arguments were without merit (Pet. App. B1). In addition, the court held that, because petitioner had failed to comply with the statutory prerequisites for suit under the Federal Tort Claims Act, there was no jurisdiction over those claims (Pet. App. B1).

3. On petitioner's appeal, the court of appeals held that *Gendron* controls the issue of the constitutionality of 38 U.S.C. 3404(c), and therefore it affirmed the district court's judgment in this respect (Pet. App. A3-A6). The court also found that petitioner had not properly invoked jurisdiction under the Federal Tort Claims Act and that the district court lacked jurisdiction to review the VA's handling of

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[2]This limitation applies to attorney's fees but is inapplicable to reimbursement for expenses incurred in connection with a claim. See 38 C.F.R. 14.634(b).

petitioner's disability claims in light of the preclusion provision in 38 U.S.C. 211(a) (Pet. App. A2-A3); because the correct disposition was to dismiss the complaint for lack of jurisdiction rather than to enter summary judgment, the court of appeals vacated this portion of the district court's judgment and remanded for entry of a judgment of dismissal (*id.* at A6).

ARGUMENT

1. Petitioner contends (Pet. 5-16) that the $10 fee limitation prevents him from retaining counsel and thus violates his right to procedural due process. The courts below correctly rejected this contention on the authority of *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal.) (three-judge court), aff'd mem. *sub nom. Gendron* v. *Levi*, 423 U.S. 802 (1975). Furthermore, as in *Gendron*, there is no need in the instant case for plenary review by this Court. Accordingly, the petition should be denied.

a. In *Gendron*, this Court summarily affirmed the decision of a three-judge district court holding that the $10 fee limitation in 38 U.S.C. 3404(c) does not violate the requirements of procedural due process. As discussed in our Motion to Affirm in *Gendron* (at 3-4),[2] that decision was consistent with the decisions of every court that had considered the question. See also *Staub* v. *Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), vacated and remanded for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (table). Moreover, we demonstrated in *Gendron* (Mot. to Aff. 2-7) that since 1862 Congress has imposed limits on such fees in order to ensure that governmental benefits are received, without substantial depletion, by the beneficiary for whom

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[2]Copies of the Jurisdictional Statement and the Motion to Affirm in *Gendron* are being sent to counsel for petitioner.

they are intended;[3] that expert assistance from service organizations is available to veterans without charge in preparing and presenting their claims; and that this system, in the context of the nonadversarial procedure for determining disability benefits, fully satisfies procedural due process.[4] Finally, we showed (Mot. to Aff. 8-9) that in any event a veteran has no property interest in an unproven claim to benefits and hence that no right to procedural due process attaches.[5]

The Jurisdictional Statement in *Gendron* presented issues of both the constitutional adequacy of the procedures under 38 U.S.C. 3404(c) and the existence of a cognizable

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[3]The history and development of these limitations is traced in the Appendix to our Motion to Affirm in *Gendron*. See also *Hines* v. *Lowrey*, 305 U.S. 85, 88-90 (1938); *Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., Pts. 1 & 2, at 458-459, 500-501 (1973) (hereinafter cited as *1973 Hearings*).

[4]As the district court had held in *Gendron* (389 F. Supp. at 1307):

> Congress, having in mind the availability to veterans of experienced lay persons to represent them in applying and qualifying for benefits, along with the facilities provided by the Government, as set forth in Section 3402, Title 38, U.S.C., appears to have concluded that the provisions for the representation of veterans was quite adequate. More elaborate procedural requirements involving adversary hearing would make proceedings necessarily burdensome and lengthy to the end that there would be long delays to the detriment of the veterans, as well as the creation of a great drain on the funds provided for their comfort. Having in mind the effective measures it had taken for the representation of veterans without charge, Congress could properly limit to a nominal sum the fee paid to one representing a veteran as an agent or attorney without prejudicing the veterans' rights.

[5]The district court in *Gendron* had "conclude[d] that the plaintiff herein has no property interest in an unproven claim or in the fact the statute provides for benefits to veterans who may be able to qualify therefor" (389 F. Supp. at 1306).

property interest in unproven claims for veterans' benefits.[6] Thus, the court of appeals in this case correctly recognized (Pet. App. A5) that, whether the Court's affirmance in *Gendron* rested on the sufficiency of the procedures under Section 3404(c)[7] or the lack of a property interest in unproven benefit claims,[8] the decision in *Gendron* is dispositive of petitioner's procedural due process argument. Petitioner has the same interest in claimed benefits that Gendron did, and his application was subject to the same procedures. Because this Court's summary affirmance in

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[6]See J.S. 4, *Gendron* v. *Levi*, *supra*:

QUESTIONS PRESENTED

1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?

2. Does 38 U.S.C. § 3404, which limits to $10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuting the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to the procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?

[7]See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976); *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971); *Vitek* v. *Jones*, 445 U.S. 480, 497-500 (1980) (Powell, J., concurring).

[8]See also *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9-11 (1979); *Lavine* v. *Milne*, 424 U.S 577, 586 (1976); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 576, 577 (1972); *Richardson* v. *Perales*, 402 U.S. at 407; *Banks* v. *Block*, 700 F.2d 292, 296-298 (6th Cir. 1983), cert. denied, No. 82-7015 (Oct. 31, 1983).

Gendron constitutes a ruling on the merits,[9] the courts below correctly held that it controls this case.[10]

b. Nor is there any reason for the Court to revisit its conclusion in *Gendron* that 38 U.S.C. 3404(c) does not violate procedural due process and that the issue does not warrant plenary consideration. The basic due process analysis applied by the three-judge district court and sustained by this Court in *Gendron* has not been changed by subsequent decisions of the Court, and indeed the majority of the cases cited by petitioner (Pet. 5-16) antedated *Gendron* and were relied on by the claimant in that case.[11]

Petitioner contends (Pet. 8-9), however, that veterans' disability claims have become more complex in the nine years since *Gendron*. Whatever the correctness of this contention, it does not assist petitioner, who concedes that his claims were "relatively routine" (Pet. 11). More importantly, any changes in the disability claims system necessitated by such considerations should be left to Congress to resolve as a matter of policy. See *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 11-12.

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[9]See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

[10]Petitioner seeks (Pet. 8-9 n.6) to distinguish his case on the ground that the injuries here, unlike in *Gendron*, were service-connected. But, as the court of appeals correctly observed (Pet. App. A4), this attempted distinction is without legal significance. Both petitioner and Gendron were denied benefits for failure to meet the statutory requirements, and both challenged the denial on procedural due process grounds; that the specific reason for ineligibility was different in each instance does not alter the governing due process analysis or indicate that a different constitutional standard is applicable here.

[11]In addition, as noted in our Motion to Affirm in *Gendron* (at 3-4), the Court had denied certiorari in other cases challenging the validity of the fee limitation in 38 U.S.C. 3404(c) or predecessor statutes.

Indeed, as petitioner acknowledges (Pet. 15), Congress on several recent occasions has considered bills that would amend the fee limitation provision in 38 U.S.C. 3404(c).[12] One such bill was passed by the Senate in the last session of Congress and is currently pending in the House. S. 636, 98th Cong., 1st Sess. (1983); see S. Rep. 98-130, 98th Cong., 1st Sess. (1983); 129 Cong. Rec. S8497 (daily ed. June 15, 1983); 129 Cong. Rec. S1895 (daily ed. Mar. 1, 1983). The fact that Congress has not, to date, enacted the proposed bills does not, as petitioner suggests (Pet. 15), indicate the need for this Court's intervention. On the contrary, the fee limitation is under active consideration by Congress, which thus far has concluded that the existing system is fair and adequate[13] and should not be amended to adopt any of the alternatives that have been advanced.

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[12]In addition, in 1967 the Veterans' Administration, at the direction of the President, established a United States Veterans Advisory Commission to make a comprehensive study of the benefits system. Based on extensive review and public hearings, the Commission recommended that no change be made in the fee limitation provision. See *1973 Hearings 501-502.*

[13]See S. Rep. 98-130, *supra*, at 23, 54; S. Rep. 97-466, 97th Cong., 2d Sess. 25, 49-51, 52, 53, 102-103, 136-139 (1982); *Veteran's Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposal: Hearing on S. 636 Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 67, 109, 117, 218-219, 250-257 (1983) (hereinafter cited as *1983 Hearings*). As the Senate Committee on Veterans' Affairs stated (S. Rep. 97-466, *supra*, at 25, 49-50):

> [T]he Committee[] [has] abiding respect * * * for the high quality of representation offered by the veterans' service organizations * * *.
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> * * * * *
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> [A] very effective network of nonattorney resources * * * has evolved in the absence of significant attorney involvement in VA claims matters. * * * It is widely recognized, as the VA noted in its agency report * * *, that veterans' service officers "render sophisticated and expert assistance in prosecuting a claim" * * *.

Recent statistics indicate that the percentage of allowed claims is virtually the same for veterans represented by service organizations and those represented by attorneys. See *1983 Hearings* 67.

2. Petitioner also asserts (Pet. 17-20) that the fee limitation provision in 38 U.S.C. 3404(c) violates substantive due process. Because, as he acknowledges (Pet. 17 n.12), this contention was not presented in the courts below, it should not now be considered. See, *e.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's argument is without merit. As explained in our Motion to Affirm in *Gendron* and summarized above, the fee limitation is justified by the congressional policies of assuring that benefits are not depleted through payments to counsel and protecting veterans and their families from aggressive or unscrupulous attorneys. Congress has consistently adhered to these policies for more than a century. Especially in the context of the nonadversarial veterans' benefits system in which effective representation is provided without charge by accredited service organizations, the longstanding limitation on fees does not violate substantive due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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